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**FREEDOM FROM VIOLENCE AND THE LAW:
A GLOBAL PERSPECTIVE IN LIGHT OF THE
CHINESE DOMESTIC VIOLENCE LAW, 2015¹**

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Violence against women is a heinous human rights violation, global menace, a public health threat and a moral outrage. No matter where she lives, no matter what her culture, no matter what her society, every woman and girl is entitled to live free of fear. She has the universal human right to be free from all forms of violence so as to fulfil her full potential and dreams for the future. States have a corresponding responsibility to turn that right into reality.

-Ban Ki-Moon, March 2013.²

After a decade long struggle we now have a law, but if it does not address the problems of battered women and girls how will it make a difference?

-Guo JianMei, Women's Rights lawyer, China.

1. INTRODUCTION

On September 25th, at the 70th United Nations General Assembly, heads of state adopted the Sustainable Development Goals (SDGs).³ The SDGs target, among other things, the elimination of all forms of violence against women and girls in the public and private spheres.⁴ Two days after the adoption of these Goals, on September 27th, once again, heads of state and governments came together at a milestone Global Leaders Meeting on Gender Equality and Women's Empowerment under the leadership of Chinese premier, Xi Jinping and UN Women. Secretary Ban Ki Moon commended the Chinese leadership and called on government to "make tangible commitments that will secure true gender equality throughout the world including ending violence against women and girls."⁵

² Statement, Statement attributable to the Spokesperson for the Secretary-General on the outcome of the Commission on the Status of Women (July 31, 2015), available at <http://www.un.org/sg/statements/index.asp?nid=6660> (calling for action to prevent violence against women and girls).

³ Press Release, UN Sustainable Development Knowledge Platform, *Historic New Sustainable Development Agenda Unanimously Adopted by 193 Members*, (Sept. 25, 2014) available at <https://sustainabledevelopment.un.org/post2015/summit>.

⁴ *Transforming our World: the 2030 Agenda for Sustainable Development*, G.A Res. L.1, U.N. Doc. A/RES/L.1. ¶ 5.2.

⁵ Ban Ki-moon, Secretary-General China, Remarks at Global Leaders Meeting

China was one of the first countries to ratify the global bill of rights for women, the Convention on the Elimination of Discrimination against Women (CEDAW), in 1980, a year after the convention came into operation.⁶ Yet thirty five years after the ratification of the CEDAW China is still reviewing a draft national law against violence.

Today, one in three women in the world are subject to violence in their lifetime. And in most of the world, no place is less safe for a woman than her own home.⁷ In China, according to a 2011 study by the All China Women's Federation (ACWF), a quarter of women in China have been victims of some form of domestic violence.⁸ Regional rates of violence inflicted by intimate partners reach as high as forty-three percent in South Asia and some national violence studies show that up to seventy percent of women have experienced violence from an intimate partner.⁹ The total exceeds 700 million women worldwide.¹⁰

A recent special series of *The Lancet* on addressing violence against women provides an excellent overview of the current evidence, and includes a Call to Action. It highlights that growing international recognition creates opportunities for renewed government commitment, although solutions will not be quick or easy. To address the underlying causal drivers, governments, working together with communities and civil society, need to address the social, institutional and economic structures that subordinate women, emphasizing prevention.¹¹

on Gender Equality and Women's Empowerment at U.N. Headquarters (Sept. 27, 2015) http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp.

⁶ Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of Reports Submitted by States Parties Under Article 18 of The Convention on The Elimination of All Forms of Discrimination Against Women* (June 10, 1997), available at <http://www.un.org/womenwatch/daw/cedaw/cedaw20/china.htm>.

⁷ See, e.g., Jeni Klugman et al., *VOICE AND AGENCY: EMPOWERING WOMEN AND GIRLS FOR SHARED PROSPERITY 3* (The World Bank 2014) (reporting on the global constraints females face today, including an epidemic of violence).

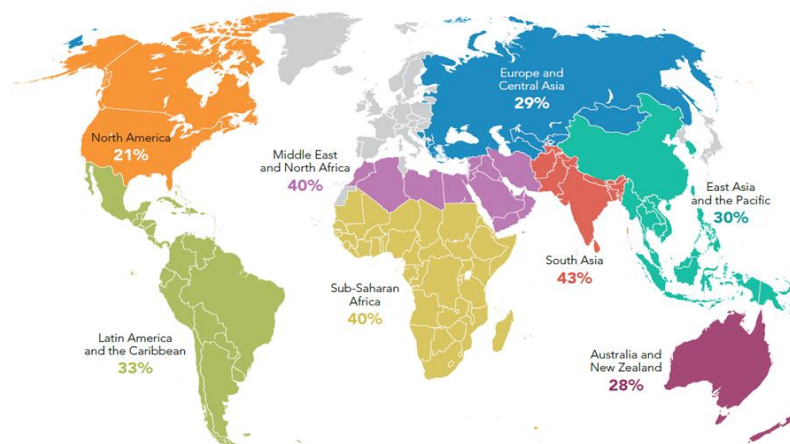
⁸ Christina Larson, *China Drafts a Law on Domestic Abuse*, BLOOMBERG BUSSINESS, (Nov. 26, 2014), <http://www.bloomberg.com/bw/articles/2014-11-26/china-drafts-law-on-domestic-abuse>.

⁹ *Facts and Figures: Ending Violence Against Women*, UNWOMEN.COM, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

¹⁰ *Id.*

¹¹ See Dr. Claudia García-Moreno et al., *Addressing Violence Against Women: a Call to Action*, 385 THE LANCET 1685, 1686 (Elsevier Ltd/Inc/BV 2015), available at

Figure 1: Regional Rates of Intimate Partner Violence Around the World



Source: Preliminary analysis by WHO (World Health Organization), presented in Klugman et al. 2014.

The main objective of this paper is to review the new Chinese Draft Law in the light of broader legal developments in the area of gender-based violence and to discuss how a human rights framework can support this critical element of the SDG agenda. We find that there has been major progress in establishing the right of women to live free of violence in both international and national law, and progress on both fronts has been especially rapid over the past decade or so. New laws reflect the cross-fertilization that can occur across borders. As Indira Jaising has said about the Pakistan Domestic Violence (Prevention and Protection) Act, 2012, which borrows from laws from elsewhere in South Asia, “We often

[http://dx.doi.org/10.1016/S0140-6736\(14\)61830-4](http://dx.doi.org/10.1016/S0140-6736(14)61830-4) (emphasizing the importance of the elimination of violence against women and girls through prevention).

do not realize it, but laws acquire a trans-border life on their own, as there is no stopping a good idea.”¹²

At the same time, a primarily criminal justice approach to gender-based violence is inadequate.¹³ Protection against violence now exists on paper in most countries of the world, yet violence remains pervasive and enforcement is often weak. Although data is scarce, the World Health Organization (2010) finds that there is little evidence of a deterrent effect of these criminal justice responses on violence against women.¹⁴ Dealing with only the consequences of violence and punishment of the perpetrators has obvious weaknesses, not least that the causes of violence can go unaddressed. It is important to recognize the importance of changing norms, and how these relate to legal reform.

Social norms in many countries condone behaviors that are associated with violence. Recent analysis of micro-data from fifty-five developing countries finds that, on average, over forty-one percent of women themselves condone violence - for various trivial reasons - with rates ranging as high as seventy-one percent in Niger.¹⁵ In this context, very few victims seek help, and most crimes still go unsanctioned and unpunished.

Our focus is partly motivated by the potential power of more progressive legal norms in changing social norms around violence. Recent micro-analysis presented in Klugman et al. (2014) suggests that women who live in countries with domestic violence laws have seven percent lower odds of experiencing violence compared with women living in countries without such laws.¹⁶ Analysis also shows

¹² Indira Jaising, Member of the UN Comm. on the Elimination of Discrimination Against Women, *International Legal Instruments and Model Framework on Legislation to Address Violence Against Women and Girls*, presentation for the Regional Seminar for Asian Parliaments (Sept. 15-17, 2011).

¹³ See Jacqui True, *The Political Economy of Violence Against Women: A Feminist International Relations Perspective*, 32 AUSTL. FEMINIST L. J. 39 (2010) (outlining the “key elements of a feminist political economy method for analyzing the causes and consequences of violence against women”).

¹⁴ See World Health Organization, *Promoting Gender Equality to Prevent Violence Against Women*, VIOLENCE PREVENTION: THE EVIDENCE (2009) (noting the urgent need for international instruments, which promote gender equality, to be properly implemented).

¹⁵ Lucia Hanmer and Jeni Klugman, *Exploring Women’s Agency and Empowerment in Developing Countries: Where do we stand?* 22.1 FEMINIST ECON. (forthcoming 2016).

¹⁶ Klugman et al., *supra* note 7, at 86 (reporting on an analysis of twenty-one countries, which had both Demographic and Health Survey data and information

that each additional year that a country had such legislation in place is associated with reduced prevalence of domestic violence by about two percent.¹⁷ These findings underscore the promise of legislative reform as a preventive measure, although laws alone are clearly not enough to eliminate violence.

The paper is structured as follows. Part One is an examination of the international legal framework. We examine the power of human rights norms in challenging orthodoxy and reshaping the agenda around gender-based violence. In Part Two we turn to a major recent milestone – the introduction of the first-ever national domestic violence law in China. This case allows us to examine what we call the second generation of anti-domestic-violence lawmaking, and we analyze China's Draft Law, the forces behind it, and suggested ways forward based on relevant good practices. This analysis raises the important role of women's groups and civil society both in terms of bringing about reform and monitoring implementation. We also highlight a recent legal guideline addressing self defense against domestic violence in China that was promulgated as a companion to the Draft Law and which complement the legal protections available for women in the Draft Law.. The concluding section summarizes key implications for the policy agenda and the post-2015 development framework.

2. THE INTERNATIONAL LEGAL FRAMEWORK

Our review of the international legal framework begins by examining multilateral conferences and treaties, before turning to regional treaties, and then to international declarations and resolutions and jurisprudence of the international criminal tribunals. International conventions and declarations have proven critical, not least because they provide concrete definitions of what constitutes gender-based violence, but also because of their role in setting standards.

Violence against women was defined by the UN Declaration on the Elimination of Violence Against Women ("DEVAW"), adopted

on legislation: Azerbaijan, Burkina Faso, Cameroon, Colombia, Cote d'Ivoire, Ghana, Haiti, Honduras, India, Kenya, Malawi, Mozambique, Nepal, Nigeria, Peru, the Philippines, Tanzania, Uganda, Ukraine, Zambia, and Zimbabwe).

¹⁷ *Id.*

by the General Assembly in 1993, as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."¹⁸

The DEVAW builds on the foundational international human rights documents reviewed below.¹⁹ Among other things, its broad definition of violence defined marital rape as violence against women for the first time. It calls on States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."²⁰ Domestic lawmaking since that time has tended to adopt this expanded definition and has moved beyond addressing only physical abuse to covering a broader spectrum of violence.

2.1. *Conventions and Treaties*

Treaty law is the supreme source of international law, and state accountability and responsibility are at the heart of treaties. State parties are required to take affirmative action to realize the rights enumerated in the treaties to which they have signed. This section highlights the key international treaties that are relevant to gender-based violence, beginning with the Geneva Conventions. Jurisprudence is discussed further below.

The Geneva Conventions of 1949 and 1977 do not specifically list sexual violence as a form of the "grave breaches" prohibited by the Conventions.²¹ Since 2002, however, the case law developed by the

¹⁸ Declaration on the Elimination of Violence against Women, G.A. Res 48/104, art. 1, U.N. Doc. A/RES/48/104 (Dec. 20, 1993). [hereinafter DEVAW 1993].

¹⁹ See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (promoting the rights to which all human beings are entitled); see also U.N. GAOR, International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (promoting the economic, social, and cultural rights of all members of the human family); see also International Covenant on Civil and Political Rights, U.N. G.A., Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (promoting the civil and political rights of individuals).

²⁰ DEVAW, *supra* note 18, at art. 4.

²¹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 50, 51, 130, 147, Aug. 12, 1949, 75 U.N.T.S. 287 (failing to include "sexual violence" in provision art. 147 articulating "grave breaches").

international tribunals and the Rome Statute of the International Criminal Court has defined sexual offenses as grave breaches of human rights.²²

The International Covenant on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights ("UDHR"), which entered into force in 1976 and 1948 respectively, contain provisions prohibiting discrimination on the basis of sex. The prohibition against "inhuman or degrading treatment" in the ICCPR has been interpreted as a prohibition of violence against women.²³

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture broadly, including "pain or suffering [that] is inflicted . . . with the consent or acquiescence of a public official."²⁴ Professor Rhonda Copelon has argued, "So far, rape—in war, by the state and where the state does not take measures against it—has been acknowledged in international law as an act of torture. Domestic violence—the most private and most common of all forms of gender violence—is on its way."²⁵

The Convention on the Rights of the Child (1990) requires that State parties take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child [up to 18 years].²⁶

The 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") was a major step forward in establishing key rights for women, and has to date been

²² See, e.g., Rome Statute of the International Criminal Court, art. 7, July 17, 1998, Doc. A/CONF.183/9 (criminalizing sexual violence as a Crime against Humanity) [hereinafter Rome Statute].

²³ See ICCPR, *supra* note 19, at art. 7; see also Shazia Qureshi, *Reconceptualising Domestic Violence as 'Domestic Torture,'* 20 J. OF POL. STUD. 35, 36 (2013) (calling for "the expansion of human right law's norm of torture prohibition, to encompass domestic violence against women incidents").

²⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment U.N. G.A., Dec. 10, 1984, 1465 U.N.T.S. 197.

²⁵ Rhonda Copelon, *End Torture, End Domestic Violence*, ON THE ISSUES MAGAZINE, Winter 2009.

²⁶ Convention on the Rights of the Child, U.N. G.A., art. 19(1), 44th Sess., U.N. Doc. A/Res/44/25 (Nov. 20, 1989).

ratified by 188 States. It obliges States "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women."²⁷ The original CEDAW did not explicitly prohibit violence against women, but rather outlawed "discrimination against women in all its forms."²⁸

Subsequent recommendations issued by the CEDAW Committee, which oversees States' compliance, have explicitly defined "discrimination" to include violence against women. Specifically, the Committee's General Recommendation No. 19 (1992) provides a broad definition of discrimination that incorporates gender-based violence including physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty.²⁹ This recommendation also clarifies that States may also "be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."³⁰ States, therefore, are responsible for inaction in preventing gender-based violence and discriminatory practices. The Optional Protocol to CEDAW (1999) allows the Committee to consider complaints from individuals or groups within its jurisdiction and provides for an additional inquiry procedure.³¹

The CEDAW Committee has issued thirty-two decisions since 2004 addressing gender-based violence. In 2005, for example, the Committee found that Hungary had violated its obligations under CEDAW because it did not provide "the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence."³²

²⁷ U.N. G.A., Convention on the Elimination of All Forms of Discrimination against Women, art. 2(f), 34th Sess., 3rd Comm., U.N. Doc. A/RES/34/180 (Jan. 22, 1980).

²⁸ *Id.* art. 2.

²⁹ U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against Women*, 11th Sess. (1992).

³⁰ *Id.*

³¹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, art. 3, 4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

³² *Views of U.N. Committee on the Elimination of Discrimination Against Women (Ms. A.T. v. Hungary)*, Jan. 26, 2005 (establishing the elimination of all forms of discrimination against women).

Finally, among relevant international instruments, the Rome Statute, which set up the International Criminal Court ("ICC"), was entered into force in 2002. This established sexual violence as a crime in international law as well as the procedures for investigating and prosecuting sexual violence offenses.³³ It classifies "rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization" as types of sexual violence and as grave crimes against humanity.³⁴ It mandates that the law applied by the ICC "be consistent with internationally recognized human rights," which may provide an argument for compelling the Court to apply principles derived from human rights instruments, including relevant non-binding declarations and resolutions.³⁵

2.2. Regional Human Rights Instruments

Several regional instruments prohibit gender-based violence. There is a major convention in Latin America, a charter in Africa, and a convention for Europe, each of which deserves highlighting.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 1994 ("Convention of Belem do Para") provided guiding principles for a treaty on violence against women.³⁶ It affirms that women have a right to be free from violence in both the public and private spheres and holds the state accountable to prevent, punish and eradicate violence against women, incorporating a due diligence standard.³⁷

The Protocol to the African Charter on Human and Peoples' Rights, on the Rights of Women in Africa, has provisions against gender-based violence within the scope of women's rights to life, integrity and security of the person, and dignity. Article One

³³ See generally Rome Statute, *supra* note 22.

³⁴ *Id.* art. 7(1)(g).

³⁵ *Id.* art. 21(3).

³⁶ See Vivienne Chin & Yvon Dandurand, VIOLENCE IN THE AMERICAS: A REGIONAL ANALYSIS (2001), available at [www.oas.org/en/cim/docs/Violence_in_the_Americas\[EN\].pdf](http://www.oas.org/en/cim/docs/Violence_in_the_Americas[EN].pdf) (reviewing the implementation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women).

³⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), art. 3, June 9, 1994 (Braz.).

defines violence against women as including "all acts perpetrated against women."³⁸ The African Charter on the Rights and Welfare of the Child includes protection from sexual abuse under the scope of "torture, cruel, inhuman or degrading punishment and treatment. . . ."³⁹

The Committee of Ministers of the Council of Europe adopted a convention on preventing and combating violence against women and domestic violence in 2011.⁴⁰ This defines violence against women as a human rights violation and as a form of discrimination. The definition of violence includes economic harm or suffering.⁴¹ The Convention contains both negative and positive duties on the part of States. State parties are called upon to exercise due diligence to prevent, investigate, and punish perpetrators, and required to provide access to services—including legal and financial assistance, psychological counseling, hotlines, and sexual trauma services.⁴²

2.3. *Declarations, Resolutions, and International Norms*

International declarations and resolutions do not have the binding force of treaties, but can contribute to the development of international legal norms and jurisprudence.⁴³

The adoption of the Vienna Declaration and Program of Action at the United Nations World Conference on Human Rights in 1993 was a watershed moment in the women's rights movement.⁴⁴ The Declaration responded to calls by civil society through the Global

³⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 1, July 11, 2003.

³⁹ African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 1520 U.N.T.S. 217, No. 26363.

⁴⁰ See Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, available at <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> (promoting the prevention of violence against women).

⁴¹ *Id.* art. 3(a).

⁴² *Id.* art. 5(2), 8, 20(1), and 25.

⁴³ See Richard A. Falk, *On the Quasi Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966) (analyzing the binding force of resolutions of the UN General Assembly).

⁴⁴ See Charlotte Bunch, *The Global Campaign for Women's Human Rights: Where Next After Vienna?*, 69 ST. JOHN'S L. REV. 171, 173 (1995) ("[the Vienna Declaration] was an important catalyst in the effort to make women's human rights visible").

Campaign for Women's Human Rights.⁴⁵ For the first time, women's rights were explicitly accepted as human rights, paving the way for the integration of women's rights into human rights norms and practice.

Prior to the Vienna Conference, women's human rights were mostly absent from the international human rights agenda, because the human rights framework maintained a dichotomy between the public and private spheres.⁴⁶ Because the human rights agenda concerned itself primarily with acts taking place in the public sphere, intimate partner violence was regarded as being outside its framework.

This changed in Vienna, which also led to the creation of the United Nations Special Rapporteur on Violence Against Women in 1994. This office reports to the United Nations Human Rights Council and is tasked with "seeking and receiving information on violence against women," as well as "recommending measures . . . to eliminate all forms of violence against women."⁴⁷ In 1996, Radhika Coomaraswamy, the first such Rapporteur, stated that "the international human rights framework could be applied to address discriminatory laws or customs, like (national) exceptions for marital rape or the defense of honor, which exempt perpetrators of domestic violence from sanctions and reflect the consent of the State."⁴⁸

Other important international declarations which have recognized violence against women as a violation of human rights include the Programme of Action of the International Conference on Population and Development (1994), the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (1995), the Southern African Development Community's Declaration on Gender and Development (1997), and the Addendum on the Eradication of All Forms of Violence Against Women and Children (1998). The Addendum recognizes the

⁴⁵ *Id.* at 172 (noting the Declaration's attempt to promote women's human rights through the Global Campaign).

⁴⁶ See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-envision of Human Rights*, 12 HUM. RTS. Q. 486, 491 (1990) (analyzing how this dichotomy has historically enabled states to justify female subordination in the home).

⁴⁷ C.H.R. Res. 1994/45 ¶ 7, U.N. Doc. E/CN.4/RES/1994/45 (March 4, 1994).

⁴⁸ ESCOR, Special Rapporteur on Violence against Women, its Causes and Consequences, E/CN.4/1996/53; Comm'n on Human Rights, 52nd Sess. (Feb. 5, 1996) [hereinafter ESCOR 1996].

deeply-rooted cultural and social norms that need to be addressed and covers a broad category of violence against women including physical and sexual violence, economic, psychological and emotional abuse, and traditional practices harmful to women including femicide and female genital mutilation.⁴⁹ It calls for services, such as providing easily accessible information for survivors and victims of violence, including women with disabilities, and recommends the allocation of the necessary resources to support implementation.⁵⁰

Over the past two decades, the international community has increasingly addressed sexual violence in war through a series of declarations. Security Council resolutions and international tribunals have condemned mass sexual violence—including those tragedies that took place in Rwanda (1994), the former Yugoslavia (1993), and in Sierra Leone, East Timor, Japan, Haiti, Myanmar, and Afghanistan.⁵¹ The United Nations' Response to Sexual Violence and Armed Conflict (1998) underlines the increasing intolerance for acts of mass sexual violence.⁵² Specific UN Security Council Resolutions adopted in recent years include:

- Resolution 1820 in 2008 designated widespread or systematic sexual violence as a tactic of war that requires a security and a political response;⁵³
- Resolution 1888 in 2009 called for a Special Representative of the Secretary-General on wartime sexual violence, a team of rule-of-law experts on the issue, and female protection advisors in peacekeeping missions;⁵⁴
- Resolution 1960 in 2010 called for field-based monitoring, analysis and reporting arrangements to provide the Security

⁴⁹ *Id.* ¶ 5.

⁵⁰ *Id.* ¶ 24.

⁵¹ U.N. Security Council, 6722nd meeting, S/PRST/2012/3 (Feb. 23, 2012) (condemning sexual violence in conflict and post-conflict situations).

⁵² See generally United Nations Division for the Advancement of Women, *Sexual Violence and Armed Conflict: United Nations Response* (1998).

⁵³ S.C. Res. 1820, ¶ 1, U.N. Doc. S/RES/1820 (June 19, 2008).

⁵⁴ S.C. Res. 1888, ¶ 4, U.N. Doc. S/RES/1888 (Sept. 30, 2009).

Council with real-time information on trends and perpetrators and the naming of perpetrators of crimes;⁵⁵ and

- Resolution 2106 of 2013, which adds operational details to combat impunity for these crimes.⁵⁶

Taken together, these international declarations and resolutions signify that the international community regards gender-based violence as unacceptable, in peacetime and in war.

2.4. *Jurisprudence of International Human Rights Tribunals*

A review of the jurisprudence of international human rights tribunals reveals that expansive definitions of violence have been adopted alongside clear standards of due diligence. This evolving human rights jurisprudence on violence against women is also relevant to the SDGs.

As noted above, the ICC is required to investigate and prosecute gender-based crimes and sexual violence.⁵⁷ In the aftermath of the atrocities that took place in Yugoslavia and Rwanda, the UN Security Council created two ad hoc tribunals to adjudicate war crimes, genocide, and crimes against humanity. In the course of adjudicating these cases, the tribunals have developed an important body of jurisprudence regarding gender-based violence, which is briefly reviewed here.

In the landmark 1998 decision, *Prosecutor v. Akayesu*, the accused was convicted of genocide and crimes against humanity for acts of sexual violence due to his inaction and omissions in relation to the mass rape, forced public nudity, and sexual mutilation of

⁵⁵ S.C. Res. 1960, ¶ 6, U.N. DOC. S/RES/1960 (Dec. 16, 2010).

⁵⁶ S.C. Res. 2106, ¶ 18, U.N. DOC. S/RES/2106 (June 24, 2013).

⁵⁷ See generally Susana SáCouto, Director of the War Crimes Research Office, Remarks at American University Washington School of Law Conference: Addressing Sexual and Gender-Based Violence in Conflict and Post-Conflict Settings: National and International Strategies (Feb. 1, 2012) (transcript available at <http://www.genderjurisprudence.org/index.php/commentaries/78-investigation-and-prosecution-of-sexual-and-gender-based-violence-by-the-international-criminal-court-mandate-good-policy-or-both>) (highlighting the predominance of gender-based and sexual violence prosecutions in front of the ICC as a result of obligations arising from the Rome Statute).

Tutsi women perpetrated by Hutu men.⁵⁸ The significance of this case was twofold. First, Akayesu was found guilty despite the fact that he had not physically engaged in acts of violence. Second, the International Criminal Tribunal for Rwanda adopted a comprehensive definition of rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."⁵⁹ The court specifically noted that its definition of rape went beyond the traditional definition of national jurisdictions, including "the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."⁶⁰

Other jurisprudence has held that witnessing acts of violence can constitute torture. In *Prosecutor v. Delalic*, the International Criminal Tribunal for the former Yugoslavia found that "willfully [sic] causing great suffering or serious injury to body or health" constituted a grave breach of the Geneva Conventions.⁶¹ Here, a group of individuals at the Celebici prison camp in Bosnia and Herzegovina were found guilty of, among other things, torture for acts or omissions that included rape and other forms of sexual violence. Further, in *Prosecutor v. Furundzija*, the commanding officer who was present during acts of sexual violence and who facilitated the commission of the crimes was found guilty of the charges of "[v]iolation of the [l]aws or [c]ustoms of [w]ar (outrages upon personal dignity including rape)."⁶² Significantly, the Court held that the humiliation accompanying sexual violence and the forced witness of rape amounted to torture.⁶³ In *Prosecutor v. Gacumbitsi*, which was also related to events in Bosnia and Herzegovina, the courts considered the nature of consent. The appeal judgment specifically clarified that "it is not necessary . . . for the Prosecution to introduce evidence concerning the words or

⁵⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sep. 2, 1998), <http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf> (finding Akayesu guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity).

⁵⁹ *Id.* ¶ 598.

⁶⁰ *Id.* ¶ 596.

⁶¹ *Prosecutor v. Delalic, Mucic, Delic, & Landzo*, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 416 (Feb. 20, 2001), *available at* <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

⁶² *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ¶ 275 (Dec. 10, 1998), *available at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.htm>.

⁶³ *Prosecutor v. Furundzija*, Case No. T-95-17/1-T, Judgment, ¶ 171, 272 (Dec. 10, 1998).

conduct of the victim . . . [nor] evidence of force" and that "non-consent [can be inferred] from the background circumstances, such as an ongoing genocide campaign or the detention of the victim."⁶⁴ The court found that "[a]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise . . . can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise."⁶⁵

Another important strand of jurisprudence has been the development of the due diligence principle. This holds governments accountable to prevent, investigate and punish acts of violence against women. This holds true whether those acts are perpetrated by the State or by private individuals. Thus, a government is responsible not only for the actions of its own agents—like law enforcement personnel, military officials, and civil authorities—but it also has a duty of diligence to protect women from violence and to enforce laws to prevent and punish violence against women. Due diligence is a yardstick for assessing the efficacy of government action and the standard to which governments will be held accountable under women's human rights.⁶⁶ A government that fails to take such measures can be held to have breached its due diligence duties and therefore complicit in human rights abuse.

The UN Special Rapporteurs have provided clarity as to the meaning of due diligence. In 2006, Rapporteur Ertürk affirmed that this standard of due diligence is universal, as well as a rule of customary international law.⁶⁷ In 2013, the annual report of the UN

⁶⁴ Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Appeals Chamber Judgment, ¶ 155 (July 7, 2006), available at <http://www.unict.org/sites/unict.org/files/case-documents/ictr-01-64/appeals-chamber-judgements/en/060707.pdf>.

⁶⁵ *Id.*

⁶⁶ Special Rapporteur on Violence against Women Call for submissions: Country visit to the Republic of South Africa, available at <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VAW.aspx> (last visited Sep. 1, 2015) (demonstrating the criteria used to assess a country's due diligence: referring to the level of care or activity that a duty-bearer is expected to exercise in the fulfillment of their duties).

⁶⁷ U.N. ESCOR, Report of the Special Rapporteur on Violence against Women, its Causes, and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 29, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) [hereinafter Ertürk] (supporting the due diligence standard to eradicate violence against women and improve women's human rights).

Special Rapporteur reviewed state responsibility for eliminating violence against women in terms of due diligence.⁶⁸

The due diligence standard has perhaps been best elaborated upon in the context of the European Convention on Human Rights ("ECHR"). Indeed, the recent European Court of Human Rights' ("ECtHR") cases of *Aydin v. Turkey*, *Bevacqua and S. v. Bulgaria*, and *Opuz v. Turkey*, together signify a turning point for the ECHR and international law. In *Aydin v. Turkey*, the ECtHR found that the State did not act with due diligence as it failed to seek out eyewitnesses to the rape and torture of the applicant.⁶⁹ The ECtHR agreed that there was an "absence of an independent and rigorous investigation and prosecution policy. In *Bevacqua and S. v. Bulgaria*, the ECtHR ruled that States party to the ECHR should ensure that all victims of violence are able to institute proceedings, that criminal proceedings can be initiated by public prosecutors, and that prosecutors should regard violence against women as an aggravating or decisive factor in deciding whether to prosecute in the public interest.⁷⁰ The Council of Europe has also recommended that state parties should use protection orders and interim measures to protect victims, and should ensure that children's rights are protected during proceedings.⁷¹ Moreover, in *Bevacqua and S. v. Bulgaria*, the Court also held that the authorities' failure to impose sanctions on law enforcement amounted to a refusal to provide the immediate assistance the applicant needed.⁷² This decision thus established minimum requirements for compliance with due diligence obligations. In the 2009 decision, *Opuz v. Turkey*, the Court recognized the state's failure to exercise due diligence as

⁶⁸ U.N. GAOR, Report of the Special Rapporteur on violence against women, its Causes, and Consequences, 23rd Sess., ¶ 11, U.N. Doc. A/HRC/23/49 (May 14, 2013) (by Rashida Manjoo) [hereinafter Manjoo] (analyzing the due diligence standard in relation to a State's effective fulfillment of its obligations).

⁶⁹ *Aydin v. Turkey*, No. 57/1996/676/866, Eur. Ct. H.R. Judgment, ¶ 109 (1997), available at <http://hudoc.echr.coe.int/eng>.

⁷⁰ *Bevacqua v. Bulgaria*, No. 71127/01, Eur. Ct. H.R. Judgment (Jun. 12, 2008), available at <http://hudoc.echr.coe.int/eng>; see also Council of Europe, *Recommendation of the Committee of Ministers to member states on the protection of women against violence* (Apr. 30, 2002), available at <https://wcd.coe.int/ViewDoc.jsp?id=280915> (demonstrating the implementation of court rulings into Council of Europe recommendations) [hereinafter Council of Europe Recommendations 2002].

⁷¹ *Id.* ¶ 31, 58.

⁷² *Bevacqua*, *supra* note 70, at ¶ 83.

gender discrimination.⁷³ This decision provides several minimum standards for protection, investigation, and prosecution. These standards include a judicial mechanism for obtaining protective measures and the availability of prosecution in the public interest for all crimes of domestic violence.⁷⁴

The reasoning in the *Opuz* case warrants brief elaboration. In *Opuz*, the applicant and her mother endured years of physical abuse and threats from Nahide's husband, who eventually killed mother.⁷⁵ The applicant and her mother had complained of the inappropriate treatment to law enforcement authorities on numerous occasions. However, officials did little in response. In reaching a judgment, the European Court looked to the Turkish Criminal Code, the Family Protection Act 1998, and referenced U.N. Special Rapporteur Ertürk's 2006 report on the due diligence standard.⁷⁶ The European Court quoted Ertürk's conclusion that there is a rule of customary international law that "obliges States to prevent and respond to acts of violence against women with due diligence."⁷⁷ The Court found that because domestic violence was shown to affect women far more than men and since Turkey had failed to exercise due diligence in providing protection from domestic violence, the state had violated Article 14 of the European Convention.⁷⁸ In clarifying its standards for finding discrimination, the Court looked to the 2007 decision of *D.H. and Others v. Czech Republic*, for the holding that:

[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule - although formulated in a neutral manner - in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on the grounds of sex.⁷⁹

⁷³ *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. Judgment (Jun. 9, 2009), available at <http://hudoc.echr.coe.int/eng?i=001-92945>" (recognizing domestic violence as an issue of gender discrimination).

⁷⁴ *Id.* ¶ 81, 176.

⁷⁵ *Id.*

⁷⁶ *Id.* ¶ 70, 79.

⁷⁷ Ertürk, *supra* note 67, ¶ 29.

⁷⁸ *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. Judgment, ¶ 200-202, (Jun. 9, 2009), available at <http://hudoc.echr.coe.int/eng?i=001-92945>".

⁷⁹ *D.H. and Others v. Czech Republic*, No. 57325/00, Eur. Ct. H.R., Grand

The European Court concluded that the applicant was able to demonstrate that "domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."⁸⁰

As it stands, the due diligence standard in international law requires that States must provide individual women with the means to obtain some form of enforceable protective measure, such as a restraining order. States must also establish the legal framework to enable criminal prosecutions of domestic violence and respond effectively to requests for help from law enforcement.

Over the last decade, civil society organizations have used States' international obligations to protect women against violence argue for reforms in national laws and policies. Radhika Coomaraswamy has described the violence against women movement as "perhaps the greatest success story of international mobilization around a specific human rights issue leading to the articulation of international norms and standards and the formulation of international programmes and policies."⁸¹ Activities have included sixteen days of action every October; annual White Ribbon Days (the largest effort in the world of men working to end men's violence against women), which are now commemorated in many countries on November 25; the International Day for the Eradication of Violence Against Women; and a Call to Action included in *The Lancet*.⁸²

It has been argued that domestic violence is a form of torture.⁸³ It is even perhaps reaching the level of a peremptory norm of *jus cogens* that stands for universal or higher law.⁸⁴ As such, customary

Chamber Judgment, ¶ 180 (2007), available at <http://hudoc.echr.coe.int/eng#> (analyzing discrimination of Romani children in the education system).

⁸⁰ *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. Judgment, ¶ 198.

⁸¹ Rangita de Silva de Alwis, *Domestic Violence Lawmaking in Asia: Some Innovative Trends in Feminist Lawmaking*, 29 UCLA PAC. BASIN L.J. 176, 186 (2012) [hereinafter *Domestic Violence Lawmaking in Asia*].

⁸² See García-Moreno et al., *supra* note 11, at 1705 (demonstrating the interdisciplinary initiatives taken as part of the violence against women movement).

⁸³ Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, COLUM. HUM. RTS. L. REV. 291, 296 (1994) (examining domestic violence through the lens of the international law understanding of torture).

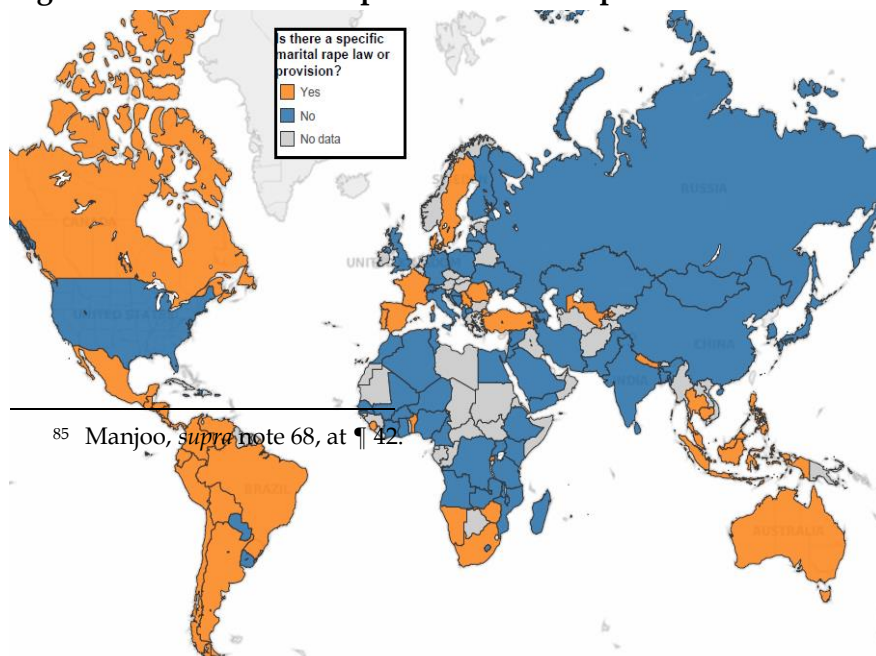
⁸⁴ See generally David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219 (2005) (arguing that the prohibition of rape in international humanitarian law has become a fundamental norm of *jus cogens*).

international law obliges all States—regardless of which, if any, conventions they have signed—to prevent and respond to acts of violence against women. At the same time, however, the view expressed by the current Special Rapporteur, Rashida Manjoo, in her 2013 report is that “there is no legally binding instrument under international law, specifically on violence against women, to effectively monitor State responsibility to act with due diligence in their efforts to respond to, prevent and eliminate all forms of violence against women.”⁸⁵ It is certainly true, as we reveal in the analysis that follows, that while international legal norms have been influential, there remain many gaps and lacunae at the national level. This includes China, the case to which we now turn.

3. NEW LAWMAKING ON DOMESTIC VIOLENCE: THE CASE OF CHINA

There is increasing momentum around the world to address domestic violence through national legislation. In 1976, only one country had such laws in place. By 2014 the number had grown to seventy-six countries. As shown in Figure Two, this covers large parts of the world. Yet, conspicuous gaps remain including, until now, China.

Figure 2: Countries with Specific Marital Rape Law or Provision



Source: Women Business and the Law: Removing Restrictions to Enhance Gender Inequality, The World Bank, 2014.

As the world marked the historic twentieth anniversary of the Beijing Platform of Action, China's State Council released a draft law against domestic violence responding to calls that had been raised by, among others, the CEDAW Committee in 1999 and in 2006 and civil society.⁸⁶ In China there had been many years of advocacy, leading to the state-run All China Women's Federation's ("ACWF") recommendation in 2008 that the National People's Congress ("NPC") draft a law to address domestic violence.

In this section, we review the genesis and evolution of the draft law in China. We begin by examining the patchwork of provisions at the national and provincial levels that emerged prior to the draft law. Then, we focus on the new draft law itself. The law shows the interplay of international human rights and national activism. In particular, the law highlights the relationship between the CEDAW Committee, domestic advocates and scholars, and the influence of changing international legal norms. The narrative highlights the pivotal role of civil society organizations in bringing domestic violence to the forefront of the policy agenda. These organizations include the Center for Women's Law Studies & Legal Services of Peking University (also known as the Beijing Women's Law Center), the Anti-Domestic Violence Network of China Law Society, and Beijing Maple Women's Psychological Counseling Center.

Although the law is a milestone, it has several major shortcomings in terms of the scope of violence and relationships

⁸⁶ China ratified CEDAW in 1980. In 2006, the Committee called upon China to address violence against women both in the private and public sphere both in the home and in detention centers. U.N. CEDAW, 36th Sess., 743d-744th mtg., U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006).

covered, the implementation mechanisms utilized, and the nature of protection resources provided. The CEDAW Committee has already voiced concerns. In November 2014, they noted that the draft lacked sufficient sanctions and shelters, and the timeframe for adoption was missing.⁸⁷ The Committee also urged China to use General Recommendation No. 19 (1992) on violence against women, as well as its jurisprudence, when elaborating its Draft Law.⁸⁸

3.1. Context for Reforms in China

Calls by the ACWF and other advocates for anti-domestic violence legislation sparked an investigation by the Supreme People's Court. This investigation, published in January 2013, found that current laws and regulations inadequate to protect women from domestic violence. The Court found that there is no clear standard for investigating and prosecuting domestic violence cases. Most often, even when such cases do come before courts, judges tend to treat domestic violence as a marital dispute and issue light punishments to abusers.

On July 28, 2015, the Chinese State Council submitted the draft law to the National People's Congress (NPC) – which is, at the time of this writing, before the NPC for review.⁸⁹ There is hope on the part of the ACWF that the law might come out in 2015 to mark Beijing+20. On the other hand, advocates, scholars and practitioners are willing to wait until the gaps in the draft law are filled.

While data is scarce, a recent report released by the All-China Women's Federation estimated that nearly forty percent of Chinese women who are married or involved in a relationship experience physical or sexual violence.⁹⁰ The main victims of domestic violence are women, children, and the elderly. As has been found elsewhere,

⁸⁷ U.N. CEDAW, 59th Sess., 1251st-1252d mtg., U.N. Doc. CEDAW/C/CHN/CO/7-8 at ¶ 26 (Nov. 14, 2014) (responding to the combined seventh and eight periodic reports of China) [hereinafter CEDAW 1987]

⁸⁸ *Id.* ¶ 24.

⁸⁹ Draft Anti-Domestic Violence Law of the People's Republic of China, available at <http://chinalawtranslate.com/domestic-violence-law/?lang=en>.

⁹⁰ Wang Qian, *Domestic Violence 'a Social Problem', Not a Private One*, CHINA DAILY, Nov. 26, 2014, http://www.chinadaily.com.cn/china/2014-11/26/content_18980189.htm (recognizing the widespread occurrences of domestic violence and its consequences).

women who experience domestic violence suffer a range of negative repercussions. In China, these women are more likely to have miscarriages or abortions and to suffer from depression; many reportedly considered or attempted suicide. However most abused women do not seek help, with a mere seven percent of those surveyed calling the police. A recent survey of one county in China by Partners for Prevention revealed similar shares of women having experienced violence.⁹¹

Over the past decade, in the absence of a national law, advocates pushed for responses against domestic violence. These efforts helped to create a groundswell of advocacy support for more comprehensive action at the national level. We examine the national level reforms before turning to important initiatives at the provincial level.

The term domestic violence was first introduced into Chinese law in the Amendment to the Marriage Law in April 2001, under which domestic violence was introduced as grounds for divorce.⁹² However, the law lacked a clear definition of domestic violence leading advocates to call upon the Supreme Court to clarify this ambiguity. In 2001, the Interpretation of the Supreme People's Court on Several Issues Regarding the Marriage Law of China, defined acts of violence as those actions that limit women's freedom and cause bodily or mental damage.⁹³ At the same time, it is notable that it was not until 2013 that the US citizen Kim Lee made legal history in China when she was granted a divorce from her Chinese national husband on the grounds of domestic violence.⁹⁴

⁹¹ See Wang Xiangxian et al., RESEARCH ON GENDER-BASED VIOLENCE AND MASculINITIES IN CHINA: QUANTITATIVE FINDINGS (United Nations Population Fund 2013), available at http://www.partners4prevention.org/sites/default/files/resources/china_quantitative_full_report.pdf (analyzing the prevalence of gender-based violence and its risks, consequences, and protective factors).

⁹² See Charles J. Ogletree Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 269-271 (2004) (describing the origins of domestic violence protections in China) [hereinafter *Recently Revised Marriage Law of China*].

⁹³ See Supreme People's Court, *Interpretation No. 1 of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China*, (Dec. 25, 2001) (China) available at <http://www.lawinfochina.com/display.asp?lib=law&id=4914> (defining several terms within the 2001 amendment).

⁹⁴ Daily Mail Reporter, *American Woman Kim Lee Becomes Unlikely Hero to Millions of Battered Wives in China*, THE DAILY MAIL (April 12, 2012, 6:39 PM EST), <http://www.dailymail.co.uk/news/article-2133340/American-woman-Kim-Lee-unlikely-hero-millions-battered-wives-China.html>.

The revised Law on the Protection of Women's Rights and Interests ("LPWRI") (2005) prohibits domestic violence against women and explicitly regards the prevention and control of domestic violence as a state responsibility (Article 46). This is an important statement of legal principle, but lacks a cause of action or legal remedies and it has never been enforced in a court of law.

In what was considered a landmark issuance, emergency restraining orders were included in the Supreme People's Court Guide on Handling Cases of Domestic Violence and Marriage Cases.⁹⁵ This drew on international standards and defined domestic violence as physical, sexual, psychological, and economic control.⁹⁶ Chen Min, a leading domestic violence advocate, described its introduction as "a small step in law theory, but a big step in judicial practice." Under such orders, alleged victims can now seek an emergency restraining order for fifteen days, or a long-term protection order for three to four months from the court. The Guide defines the role of the police in receiving and handling domestic violence reports. New ground was also broken regarding the burden of proof, which shifts to the alleged perpetrator once the victim has made a *prima facie* case of domestic violence.⁹⁷ The Guide further addresses compensation for victims of violence and property allocation. If the victim is not working or is financially impoverished, then the Guide requires the payment of alimony, child support, and medical expenses.⁹⁸ Another distinguishing element of the Guide is its recognition that the victim's behavior does not justify a lower punishment in cases of domestic violence.⁹⁹

That said, this patchwork of laws and official guidance did not come close to a legal prohibition against domestic violence at the national level. What was noteworthy, however, was that these policies were spawned by the initiatives led by non-state actors and helped galvanize civil society groups. This included the Anti-Domestic Violence Network, spanning twenty-eight provinces and autonomous regions. In 2002, an expert group led by Professor

⁹⁵ See *Explanations on the Law of the People's Republic of China on the Prevention and Punishment of Domestic Violence (A Draft Proposed by Experts)*, CHINA LEGAL SCIENCE (Feb. 2010), available at <http://www.iolaw.org.cn/showLaws.asp?id=22730>.

⁹⁶ *Id.* § I ¶ 1.

⁹⁷ *Id.* § III ¶ 6.

⁹⁸ *Id.* § III ¶ 5.

⁹⁹ *Id.* § III ¶ 6.

Chen Mingxia was established to raise public awareness and to draft a law to prevent and control domestic violence. A 2007 draft covered physical, psychological, sexual, and economic violence in the spirit of CEDAW, and an expanded definition of what constitutes a family member, including parties to a family, both post-marriage and in intimate partner relations.

In the absence of a national law, women's rights advocates lobbied for domestic violence legislation at the local level to fill this void. Many provinces, autonomous regions, and municipalities, including Zhejiang, Heilongjiang, Gansu, Shaanxi, Guizhou, Anhui, Ningxia, Tianjin, Jilin, Guangdong, and Shanghai, passed such legislation.¹⁰⁰ For example, the Rules on the Prevention and Interdiction of Family Violence of Hebei Province, provides a definition of domestic violence covering "the behaviors causing physical and/or spiritual injuries to other family members through beating, binding, and cruelly injuring them, or coercively constraining their personal freedom, or any other means."¹⁰¹ Similarly, the Anhui Province regulations state: "When dealing with family violence, public security institutions should collect and preserve by law the evidence related to the family violence" and allows for NGO assistance in collecting evidence.¹⁰² This was an important step in a legal landscape where proving domestic violence was often challenging.¹⁰³ In identifying some of these urgent needs, some of these local regulations called for immediate intervention by public security officials and for the public prosecution of domestic violence cases. The first domestic violence regulation in a minority autonomous region was passed in Inner Mongolia in 2006.¹⁰⁴

By the end of 2004, twenty-two of twenty-eight provinces had established regulations, measures, or legal opinions against

¹⁰⁰ See Li Mingshun, *The Progress and Analysis of Women's Human Rights Protection in the Legislation 2007 in China*, 7.4 HUMAN RIGHTS 24, 27 (July 2008) (analyzing and promoting women's human rights through legislation).

¹⁰¹ *Id.* at 30.

¹⁰² *Id.*

¹⁰³ *Recently Revised Marriage Law of China*, *supra* note 92, at 293 (juxtaposing the promise of the new legislation with the difficulty in implementing the legislation's benefits given the burden of proof needed to show domestic violence).

¹⁰⁴ Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reforms in China*, 5 E. ASIA L. REV. 197, 277 (2010).

domestic violence.¹⁰⁵ The ACWF, which acts as the official spokesperson of the women's movement in China and is closely associated with the Communist Party, had set up 110 domestic violence telephone hotlines, complaint stations, and first aid stations including psychological help and legal aid stations.¹⁰⁶ Services for victims and families afflicted by domestic violence were set up in sixteen provinces and at local levels. For example, in 2003, the ACWF set up a service in Tieyang to provide abused women with asylum, legal advice, and medical services. These provincial approaches included concrete implementation guidelines.

Although figures are not available, the provincial-level legislation did enable a very small, but growing, number of women to access the courts to vindicate their rights. In Hunan Province, for example, courts have issued protection orders prohibiting violence and specifying that the perpetrator must stay 200 meters away from the victim's residence.¹⁰⁷

At the same time, as the CEDAW committee found when reviewing China's seventh and eighth state party reports in 2014, a comprehensive law on violence against women was a void that needed to be urgently filled. In 2014, the CEDAW Committee called upon China to provide immediate means of redress and protection to women and girls who are victims of violence, in accordance with the Committee's General Recommendation 19.¹⁰⁸ We now examine to what extent the new draft law fills this need.

3.2. *A Critique of the Draft Law*

In November 2014, China's State Council's Legislative Affairs Office, a top government body, published a draft national law

¹⁰⁵ *White Paper on China's Progress in Human Rights*, at Pt. IV (2004), available at <http://china.org.cn/e-white/20050418/IV.htm>; see also Zhang Xiaoling, *Human Rights of Women and a Harmonious World*, 6 HUMAN RIGHTS, CHINA SOCIETY FOR HUMAN RIGHTS STUDIES (2007), Section II 1(1) available at <http://211.167.236.236/zt/magazine/200402007419134840.htm> (examining the development of women's equal rights in political, economic, and social spheres).

¹⁰⁶ *Id.* at 48.

¹⁰⁷ Congressional-Executive Comm'n on China (March 8, 2010) (statement of Katherine Zhao), available at <http://www.cecc.gov/events/roundtables/women-in-a-changing-china>.

¹⁰⁸ CEDAW 1987, *supra* note 87.

against domestic violence, hereinafter referred to as the “Draft Law”. It outlines responsibilities and responses of various government entities in cases of domestic violence and the kinds of protection available to the victims. Among the innovations is that social organizations and individuals would have the right to report violence and police would be obliged to investigate claims.¹⁰⁹ Those convicted would face punishment — ranging from a written reprimand to up to seven years’ imprisonment should the abuse lead to serious injury or death.¹¹⁰

The Draft Law is a step forward in several key respects, but has major shortcomings revealing that the draft is significantly behind global and regional good practice in the shape of the legislation. Expressing a view that appears to be shared by many advocates in China, Feng Yuan, co-founder of anti-domestic violence group Equality, described the new law as very significant but still a “work in progress.”¹¹¹

The Draft Law defines domestic violence for the first time and offers clear guidance on a streamlined process for obtaining restraining orders.¹¹² However there are a series of major gaps — related to those covered by the law, the definition of violence, prevention and protection, protection orders and in facilitating access to justice — which we examine in turn below.

The Draft Law provided for a comment period.¹¹³ There was a one month period to make comments on the draft law. Although this comment period is a good practice, the promulgation of the law should not be seen as conclusive and immutable. Lawmaking is a dynamic process and responds to social change. One recent example is the reauthorization of the Violence against Women Act of the United States, which, in 2013, was explicitly extended to protect the LGBTQ community.¹¹⁴ In this spirit, we identify some of

¹⁰⁹ Draft Anti-Domestic Violence Law of the People's Republic of China, art. 15, available at <http://chinalawtranslate.com/domestic-violence-law/?lang=en>.

¹¹⁰ *Id.* art. 38.

¹¹¹ Tania Branigan, *New draft law brings hope to China's abused women*, *TAIPEI TIMES* (Jan. 5, 2015), <http://www.taipetimes.com/News/feat/archives/2015/01/05/2003608493> (detailing activists' positive reaction to the new domestic violence law, as well as concerns that the scope of the law is too minimal).

¹¹² Draft Anti-Domestic Violence Law of the People's Republic of China, art. 32, available at <http://chinalawtranslate.com/domestic-violence-law/?lang=en>.

¹¹³ *Id.* art. 41.

¹¹⁴ Violence against Women Reauthorization Act of 2013, 42 U.S.C. § 304

the gaps in the law and suggest ways in which the Draft Law might be revised in order to accord with current good practices in the region and globally. The weaknesses in the law are highlighted below through the prism of international law and comparative good practice in order to illustrate examples.

3.3. *The Aims and Goal of the Law*

Article 1 states that the law follows the constitution.¹¹⁵ In Articles 33, 34, 48 and 49, China's Constitution recognizes equal rights of men and women in all spheres of life: political, economic, cultural, social and family life.¹¹⁶

Article 1 of the Draft Law also clearly states that it is premised on social stability and harmonious family relations, and that its overarching goal is to: "protect the lawful rights and interests of family members, to preserve equal, harmonious, and civilized family relationships; and to promote social stability."¹¹⁷ This contrasts with international norms that call for lawmaking that recognizes violence against women as a violation of women's rights and personal security rather than a violation of social stability.

3.4. *Relationships Covered*

The first major gap in the Draft Law relates to the scope of the law, which only covers family members and excludes unmarried and divorced couples as well as dating partners and the LGBTQ communities.¹¹⁸ This is not consistent with international norms, which recognize *de facto* and former married partners, among others. As noted earlier, the model framework, prepared by the first U.N. Special Rapporteur on Violence against women back in 1996, sets out the general international standards.¹¹⁹ The framework urges

(2013).

¹¹⁵ Draft Anti-Domestic Violence Law of the People's Republic of China, art. 1, available at <http://chinalawtranslate.com/domestic-violence-law/?lang=en>,

¹¹⁶ XIANFA art. 33, 34, 48, 49 (1982) (China).

¹¹⁷ *Id.*

¹¹⁸ *Id.* art. 2.

¹¹⁹ ESCOR 1996, *supra* note 48 (detailing a model legislation for combatting

states to cover all members of the family and household and adopt the broadest possible definition of domestic violence, which can be either physical, sexual, or psychological and can also include threats, intimidation, coercion, stalking, and humiliating verbal abuse.

A review of domestic violence legislation around the world reveals that former spouses, those in an intimate relationship, tenants,¹²⁰ houseworkers,¹²¹ and even those who share or recently shared a residence are typically protected.¹²² While first generation of domestic violence laws tended to be limited to partners to a marriage, second-generation laws since the Beijing Platform of Action have progressively broadened coverage.¹²³

In the Asia region, most national laws against violence protect a wide range of family members – except Japan's law, which only covers spousal abuse and the Philippines's law, which covers only women.¹²⁴ For example, the Cambodian Domestic Violence Law, enacted in 2005 covers all children in the family whether they were children of a nuclear family, extended family, or born of polygamous unions.¹²⁵ Likewise, the Indonesian Law Regarding the Elimination of Violence in the Household of 2004 covers the "husband, wife and children and people whose family relationship

domestic violence).

¹²⁰ Domestic Violence Act, No. 116 of 1998 § 1 (S. Afr.) (showing that South African legislation covers former spouses, those in intimate relationships, and tenants).

¹²¹ Law of the Republic of Indonesia Regarding Elimination of Violence in Household, No. 23 of 2004 art. 2, 2004, *available at* http://indonesia.unfpa.org/publications/2008/Law%20No%2023%202004_Elimination%20on%20Violence%20in%20Household.pdf (providing that protection from domestic violence can extend to houseworkers).

¹²² Domestic Violence Act, No. 116 of 1998 § 1 (S. Afr.), (showing that protection has even extended to those who formerly shared a residence).

¹²³ *Domestic Violence Lawmaking in Asia*, *supra* note 81, at 201.

¹²⁴ See, e.g., Act on the Prevention of Spousal Violence and Protection against Women, Law No. 31 of 2001, arts. 1, 2 (Japan) ("The term spousal violence as used in this law refers to illegal attacks from one spouse (including persons who are in a de facto state of marriage even if it has not been legally registered; same below) that threaten the spouse's life or physical conditions.")

¹²⁵ But see Research Directorate, Immigration and Refugee Board, Canada, *Cambodia: Domestic Violence in Cambodia, in particular, its prevalence and whether there are laws to protect the victims; if so, whether these laws are enforced; protection provided by the government* (KHM42221.FE) (Dec. 9, 2003), *available at* <http://www.unhcr.org/refworld/docid/403dd1fdc.html> (demonstrating that prior to the 2005 legislation, Cambodia provided limited protections to combat domestic violence).

with the individual referred is due to a blood relationship, marriage, suckling at the same breast, care and guardianship, and/or the individual working to assist the household and living in the household.”¹²⁶

While the scope of the Draft Law only covers parties to a marriage, a broader coverage would be more consistent with international legal and regional practices.¹²⁷

3.5. *Definitions of Violence*

The Draft Law covers only physical and psychological violence.¹²⁸ Violence as interpreted in the context of the Marriage Law includes acts which limit women’s freedoms, like beating, binding, maiming, forcible deprivation of personal liberty and other means of physical or psychological injury to a family member. The Chinese interpretation includes neither sexual violence nor economic abuse and also fails to define psychological harm or how it can be proved.¹²⁹

The Draft Law’s narrow definition is again contrary to the now-accepted definition of violence that has been endorsed by international law since the 1993 Declaration,¹³⁰ the 1996 Report authored by the Special Rapporteur¹³¹ (both noted above) and reflected in legislation from countries around the Asian region. This

¹²⁶ Law of Republic of Indonesia, No. 23/2004, Elimination of Violence in Household (2004), art. 1 (Indon.)

¹²⁷ See, e.g., Olivia Geng, *China Drafts Domestic Violence Law That Doesn’t Protect the Unmarried*, CHINA REALTIME (Nov. 28, 2014, 10:51 AM), <http://blogs.wsj.com/chinarealtime/2014/11/28/china-drafts-domestic-violence-law-that-doesnt-protect-the-unmarried/> (detailing critics’ opinions about the draft law and its inadequacies in combatting broader domestic violence).

¹²⁸ Draft Anti-Domestic Violence Law of the People’s Republic of China, art. 2, available at <http://chinalawtranslate.com/domestic-violence-law/?lang=en>.

¹²⁹ See Supreme People’s Court, *Interpretation No. 1 of the Supreme People’s Court on Several Issues in the Application of Marriage Law of the People’s Republic of China* (Dec. 25, 2001) (China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=4914> (demonstrating that the draft law’s limited view of domestic violence stems from already-existing limitations in court interpretations of marriage law).

¹³⁰ See DEVAW 1993, *supra* note 18, at art. 2 (providing a definition of domestic violence that could include sexual and economic violence).

¹³¹ ESCOR 1996, *supra* note 48, at 4.5 (providing a definition of domestic violence that could include sexual and economic violence).

international framework urges states to adopt the broadest possible definition of domestic violence, which makes clear that domestic violence can be either physical, sexual or psychological and can include threats, intimidation, coercion, stalking, and humiliating verbal abuse.

By excluding economic violence, the Draft Law fails to cover what is considered a persistent problem under China's marriage law, the illegal transfer of marital property. Concealing common property is a habitual form of violence in marriage that is not recognized in the draft domestic violence law.¹³²

Several international statements—including a U.N. Secretary General Report in 2006—explicitly include female infanticide and prenatal sex-selection as constituting violence against women.¹³³ Sex-selective abortion is a major challenge in China and is not addressed by the Draft Law. The World Bank has estimated that over one million girls are missing annually due to sex-selection abortions in China.¹³⁴ The boy-to-girl ratio at birth in China has jumped from 1.07, in 1982, to 1.20, in 2005.¹³⁵ The ratio in some provinces exceeds 1.30.¹³⁶ The Chinese Academy of Social Sciences predicts that by 2020, China will have 30–40 million more boys and young men under age 20 than females of the same age.¹³⁷

A review of legislation in the region reveals that the definitions adopted have generally been more expansive in the scope of

¹³² Recently Revised Marriage Law of China, *supra* note 92, at 261–263.

¹³³ U.N. Secretary-General, *Ending Violence against Women: From Words to Action*, 45, U.N. Doc. E.06.IV.8 (2006) (explaining how traditional practices such as female infanticide have been labeled as violence against women by the international community given the health effects and community impact).

¹³⁴ The World Bank, *World Development Report on Gender Equality and Development: Four Million Missing Women* (2012) (showing that China has the largest number of missing girls at birth, followed by India).

¹³⁵ Shuzhuo Li, *Imbalanced Sex Ratio at Birth and Comprehensive Intervention in China*, Paper Presentation at the Fourth Asia and Pacific Conference on Reproductive and Sexual Health and Rights, 2(Oct. 29–31, 2007), *available at* <http://www.unfpa.org/gender/docs/studies/china.pdf> (illustrating the increasing sex ratio in China and how abnormal it is compared to the global pattern).

¹³⁶ Wei Xing Zhu et al., *China's Excess Males, Sex Selective Abortion, and One Child Policy: Analysis of Data from 2005 National Intercensus Survey*, *BMJ* (Nov. 27, 2008), *available at* <http://www.bmj.com/content/338/bmj.b1211.abstract> (showing how this disparity varies based on region).

¹³⁷ Chi Zhou et al., *Son Preference and Sex-Selective Abortion in China: Informing Policy Options*, 57 *INT'L J. OF PUB. HEALTH* 459 (2012) (depicting the attitudes and gender preferences that help explain abnormal sex ratios).

violence, and more consistent with international law, than is the case for the Chinese Draft Law. The Bangladesh law, for instance, covers physical, sexual, psychological, and economic abuse, the latter of which covers customary practices including the demand for dowry.¹³⁸ The Vietnam law defines violence as a tool of power and control that a spouse or family member may exert in the form of customary practices such as: forced child marriage, forcing other family members to overwork or to contribute more earning than they can afford, and controlling other family members.¹³⁹ Among the cultural practices, for instance, Article 2 includes:

Insulting or other intended acts meant to offend one's human pride, honour and dignity; c) Isolating, shunning or creating constant psychological pressure on other family members, causing serious consequences; d) Preventing the exercise of the legal rights and obligations in the relationship between grandparents and grand children, between parents and children, between husbands and wives as well as among brothers and sisters. e) Forced sex; f) Forced child marriage; h) Forcing other family members to overwork or to contribute more earning than they can afford; controlling other family members' incomes to make them financially dependent; i) Conducting unlawful acts to turn other family members out of their domicile.¹⁴⁰

The Malaysian Domestic Violence Law also carries an expansive definition, including physical harm, sexual harm, and property damage with the intent to cause distress. Economic damage is defined as "personal injuries or damage to property or financial loss as a result of the domestic violence," for which the court may award compensation.¹⁴¹

¹³⁸ English Version of the Domestic Violence (Prevention and Protection) Act, No. 58 of 2010 § 3 (Bang.) (Defining domestic violence as physical, psychological, sexual or economic abuse).

¹³⁹ Law on Domestic Violence Prevention and Control, No. 02/2007/QH12 of 2008, ch.1 art. 2 (Viet.)

¹⁴⁰ *Id.* (detailing what customary and cultural practices may constitute violence given their focus on control).

¹⁴¹ Domestic Violence Act, No. 521 of 1994 § 10-11 (Malay.) (recognizing that domestic violence can cause economic damages that the court can remedy through mandated compensation).

The Philippine law is quite specific and covers sexual violence, rape, sexual harassment, "acts of lasciviousness", the treating of women as a sex object, making demeaning remarks, forced watching of obscene publications, coercing sexual activity, and prostituting the woman and child.¹⁴² Psychological and economic harms are also outlined extensively.¹⁴³ Psychological harm includes public ridicule, forcing the witnessing of porn, etc. . . . The Philippine law defines economic abuse as:

An act that makes a woman financially dependent which includes but is not limited to: withdrawal of financial support or prevention of the victim from engaging in any legitimate profession, occupation, business or activity, except in cases where in the other spouse/partner objections are valid (Article 73 of the Family Code Economic)".¹⁴⁴

Consistent with defending economic freedoms, the law clearly addresses and prohibits controlling and restricting movement.¹⁴⁵

Lack of financial support is considered a category of violence in some countries. The Indonesian law defines economic abuse as withdrawing financial support from the victim or preventing the victim from engaging in any economic activity.¹⁴⁶ The Vietnam law

¹⁴² Anti-Violence Against Women and Their Children, No. 9262 of 2004 § 3 (Phil.) (demonstrating the level of specificity that the Philippine law provided when defining the scope of actions the law seeks to remedy).

¹⁴³ *Id.* (capturing the effect of psychological and economic harms by stating violence against women and their children "refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty."); *see also* *Id.* § 3 (C), § 5 (h), § 31 (a) & § 13 (outlining types of economic and psychological abuse).

¹⁴⁴ *Id.* art. 73 (defining economic abuse).

¹⁴⁵ *Id.* § 5 (e) (stating that "attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct").

¹⁴⁶ Law of Republic of Indonesia, No. 23/2004, Elimination of Violence in

includes economic abuse as a form of domestic violence. For example, the law states that a domestic violence act constitutes that of: "forcing family members to overwork or to contribute more earning than they can afford: controlling other family members incomes to make them financially dependent."¹⁴⁷ As noted above, economic abuse is not covered by the Draft Law. Guo Jianmei, the leading women's rights lawyer in China, has argued that this is a major type of violence against women in China.

India's 2005 Protection of Women from Domestic Violence Act is the most recent domestic violence act passed in Asia.¹⁴⁸ The definition of domestic violence covers physical, sexual, and psychological violence occurring in the family including dowry related violence,¹⁴⁹ and includes injuries, endangerment to the health, safety, life, limb or well-being (whether mental or physical), sexual abuse, and verbal, emotional and economic abuse.¹⁵⁰ The law defines "verbal and emotional" abuse to include "insults or ridicule especially with regard to not having a child or a male child."¹⁵¹ Alienating any assets, operating bank accounts or lockers including her *stridhan* (dowry) can constitute violence.¹⁵² Violence in the law also includes causing violence to dependents or other relatives.¹⁵³ The law provides concrete mechanisms through which victims and family members including children can be protected. For instance, the law allots the victim a share of the abuser's property and salary, medical damages, and further allows her to remain in the family household.¹⁵⁴

Household (2004), art. 1 (Indon.).

¹⁴⁷ Law on Domestic Violence Prevention and Control, No. 02/2007/QH12 of 2008 art. 2 (h) (Viet.).

¹⁴⁸ The Protection of Women from Domestic Violence Act, No. 43 of 2005, (India).

¹⁴⁹ *Id.* Ch. 1 § 2 (defining the parameters of domestic violence).

¹⁵⁰ *Id.* Ch. 2 § 3(a) (defining the parameters of domestic violence).

¹⁵¹ *Id.* Ch. 2 § 3.3(a) (defining the scope of emotional and physical abuse).

¹⁵² *Id.* Ch. 4 § 18 (e) (stating that "alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* (dowry) or any other property held either jointly by the parties or separately by them without the leave of the Magistrate").

¹⁵³ *Id.* Ch. 4 § 18 (f) (expanding violence to include actions "causing violence to the dependents, other relatives or any person who give the aggrieved person assistance from domestic violence").

¹⁵⁴ *Id.* Ch. 4 § 15-17 (detailing the mechanisms the government uses to protect

Pakistan's law on Domestic Violence similarly lays out a broad definition of domestic violence, including emotional abuse, stalking and wrongful confinement.¹⁵⁵ The Pakistan law classified domestic violence as acts of physical, sexual or mental assault, force, criminal intimidation, harassment, hurt, confinement and deprivation of economic or financial resources.¹⁵⁶ Under the law, depriving a spouse of money or other resources needed to survive is also considered a violation of national law.¹⁵⁷

In several countries, the ambit remains limited. Cambodia for instance, continues to define violence more narrowly as only physical violence and sexual aggression.¹⁵⁸

These approaches reflect that most of the Asian region has entered a second generation of lawmaking and has adopted a more nuanced and comprehensive definition of violence, which goes beyond physical violence. The national laws are generally consistent with the Declaration on the Elimination of Violence against Women (DEVAW) definition and cover physical, psychological, economic, sexual and cultural violence. In contrast, China's new law has adopted a far more restricted approach of a type that generally predates the Beijing Platform.

victims of domestic violence).

¹⁵⁵ Domestic Violence (Prevention and Protection) Act, §2 (Pak.), Feb. 20, 2012, available at <http://www.af.org.pk/Important%20Courts'%20judgement/Women%20protection%20against%20domestic%20violence%20bil%2013pages.pdf> (providing a broad definition for domestic violence).

¹⁵⁶ See Khurram Shahzad, *Pakistan Passes Bill Against Domestic Violence*, ONE WORLD SOUTH ASIA, <http://southasia.oneworld.net/todayshadlines/pakistan-passes-bill-against-domestic-violence>.

¹⁵⁷ Domestic Violence (Prevention and Protection) Act, §2 (Pak.), Feb. 20, 2012, available at <http://www.af.org.pk/Important%20Courts'%20judgement/Women%20protection%20against%20domestic%20violence%20bil%2013pages.pdf> § 2 (h) (stating "[e]conomic Abuse Means: (i) The unreasonable deprivation of economic or financial resources to which a victim is entitled under law or which the victim requires out of necessity, including household necessities for the victim, and any payments required by law in respect of the shared residence").

¹⁵⁸ Law on the Prevention of Domestic Violence and the Protection of Victims, No. 1005/031 of 2005, art. 3 (Cam.) (providing a narrower definition of domestic violence as "Acts affecting lives, Acts affecting physical integrity, Tortures of cruel acts, Sexual aggression").

3.6. *Prevention and Protection*

The Draft Law includes prevention provisions but does not specify the services for survivors of violence and their family members. The absence of government support for shelters in China is conspicuous. A review of good practice in the region and globally suggests that domestic violence legislation is increasingly adopting a hybrid approach, which goes beyond punishment, to prevention and services for both survivors and family. Indeed, a key demand of Chinese women's groups is for comprehensive and integrated support services and coordinated state responsibility in the delivery of those services.

A comparison of national legislation reveals insights about good practice from around the world. Legal provisions in a number of countries now go beyond criminalizing violence against women to providing services for rehabilitation and recovery, including housing. National examples of mechanisms to provide for housing and shelters include Guatemala, Mexico, Turkey, Mauritius, the U.S., Austria and India. These are briefly recounted here. Article 17 of the Guatemalan Law against Femicide and other Forms of Violence against Women, 2008 requires the government to provide integrated service centers including the provision of financial resources.¹⁵⁹ The Mexican Law of 2007 includes a provision on state maintained shelters while the Turkish Local Administration Law requires larger municipalities to establish intervention centers to assist survivors.¹⁶⁰ These centers are contracted out to NGOs by the government. The Mauritius Act to Provide Protection to the Victims of Domestic Violence 1997 includes an "Occupancy Order," which allows a victim who reasonably believes that the spouse will commit further acts of violence to apply to the Court for an order granting them the exclusive right to live in the marital residence, and apply to the Court for an order so that the tenancy should vest in the victim. The United States' Violence against Women and Department of Justice Reauthorization Act (2005) introduced provisions and programs to provide exclusive housing rights to

¹⁵⁹ U.N. DIVISION FOR THE ADVANCEMENT OF WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN, at 31, U.N. Doc. ST/ESA/329, U.N. Sales No. E.10.IV.2 (2010) [hereinafter HANDBOOK].

¹⁶⁰ *Id.* at 31-32.

survivors of violence.¹⁶¹ Under Austria's Violence Protection Act (1997), all provinces are required to establish intervention centers where survivors are offered assistance after reporting to the police.¹⁶² The centers are run by women's NGOs and financed by the government on the basis of five-year contracts. The 2005 Indian Act introduced the concept of "right to residence" for women that prevent women from being forced out of their marital homes, by order of a magistrate. In Albania, the Netherlands and the US, courts may order the perpetrator to make payments toward the survivor's mortgage or rent.¹⁶³

It is instructive to review the types of services for survivors and their families that have been recognized as rights in legislation. Some relate to employment – and enabling women to continue to participate in the workforce. The Philippine Anti-Violence against Women and their Children Act allows survivors to take paid leave up to ten days. The Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) provides various social security and employment rights for survivors, including the right to reduce or reorganize working hours.¹⁶⁴

Examples of provisions providing financial support to victims can also be seen in a range of countries. Australia's Social Security Act, as amended in 2006, allows domestic violence victims to qualify for a crisis payment from the federal welfare agency when they have either left the home as a result of domestic violence or when they remain in the home following the perpetrator's departure.¹⁶⁵ The Ghanaian Domestic Violence Act (2007) established a Victims of Domestic Violence Support Fund, which receives government support as well as voluntary contributions from individuals, organizations, and the private sector.¹⁶⁶ It is used for a variety of purposes, including the basic material support of victims; any matter connected with the rescue, rehabilitation and reintegration of victims; and training and capacity building for persons connected with the provision of shelter, rehabilitation and reintegration.¹⁶⁷

¹⁶¹ *Id.* at 33.

¹⁶² *Id.* at 33.

¹⁶³ *Id.* at 46.

¹⁶⁴ *Id.* at 32.

¹⁶⁵ *Id.* at 33.

¹⁶⁶ *Id.* at 34.

¹⁶⁷ *Id.*

The lack of provision for support for victims in the Chinese Draft Law is thus a major gap, and is another critical shortcoming relative to contemporary good practice around the world.

3.6.1. Restraining Orders

The Chinese Draft Law includes provisions for restraining orders, but the window to apply for such an order is very limited. A victim has only thirty days to take legal action against her partner. If she does not, the order is dropped. Women's rights activists have noted that this is too restrictive.¹⁶⁸ Leta Hong, the author of *Leftover Women*, argues that research reveals that given the fact that legal action has profound consequences on a marriage, "requiring victims of abuse to take action within 30 days is just completely unrealistic."¹⁶⁹

Again, this aspect of the Draft Law is contrary to regional good practice, as illustrated by the Philippine and Indian examples. The 2004 Philippine Act affirms that the court should not deny a protection order due to the lapse of time between the act of violence and the filing of the application. Also relevant is Article Fourteen, whereby elected village officials are vested with quasi-judicial powers to issue ex parte protection orders of fifteen day duration, which help women access justice in a non-formal and less intimidating environment, and in a Barangay proceeding, in which the parties may be accompanied by a non-lawyer advocate. An extensive list of persons are able to apply for a protection order, including the survivor's family; social workers; police officers; village officials; lawyers and healthcare providers. Likewise, in India, protection orders are a critical component of the Domestic Violence Act.¹⁷⁰ This law provides for a protection order prohibiting

¹⁶⁸ See Gabriel Domínguez, *HRW Warns of Loopholes in China's First Domestic Violence Draft Law*, DEUTSCHE WELLE (Nov. 27, 2014), <http://www.dw.de/hrw-warns-of-loopholes-in-chinas-first-domestic-violence-draft-law/a-18092155> (arguing that the 30 day limit deters women from seeking the protection they need).

¹⁶⁹ Melissa Jeltsen, *China Drafts First National Law Against Domestic Violence*, THE HUFFINGTON POST (Nov. 26/2014, 2:10 PM), http://www.huffingtonpost.com/2014/11/26/china-domestic-violence_n_6225876.html.

¹⁷⁰ The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 18 (India) (providing the procedures under which a protection order is granted).

the respondent from committing any act of domestic violence;¹⁷¹ aiding or abetting the commission of acts of domestic violence;¹⁷² entering the place of employment of the aggrieved person or any other place frequented by the aggrieved person;¹⁷³ attempting to communicate in any form whatsoever;¹⁷⁴ alienating any assets, operating bank accounts used or held or enjoyed by both parties.¹⁷⁵ The protection order includes a residence order directing the respondent to remove himself from the shared household;¹⁷⁶ restraining the respondent or any of his relatives from entering the shared household;¹⁷⁷ or restraining the respondent from alienating the shared household.¹⁷⁸ These regional cases suggest possible alternative approaches for China's domestic violence lawmaking.

3.6.2. *Redefining Self-Defense: New Guidelines*

Guidelines to judges and police on "Handling Criminal cases of Domestic Violence in Accordance with Law" issued in March 2015, complement the Draft Law's goals of criminalizing domestic violence and state that self-defense can apply in cases where defendants are trying to prevent domestic violence.

This legal initiative appears to be a response to the Li Yan case, where a woman killed her husband following years of serious abuse. The violence included beatings, kicking, burning with cigarette butts, and being locked out of the home in the winter months without food or drink.¹⁷⁹ Li had repeatedly complained about Tan's abuses to the police, to the neighborhood committee, and to the local ACWF branch, without any response. Ultimately, when the husband had threatened to shoot Li, she grabbed the rifle and struck him with it, killing him.

¹⁷¹ *Id.* § 18(a).

¹⁷² *Id.* § 18(b).

¹⁷³ *Id.* § 18(c).

¹⁷⁴ *Id.* § 18(d).

¹⁷⁵ *Id.* § 18(e).

¹⁷⁶ *Id.* § 19(b).

¹⁷⁷ *Id.* § 19(c).

¹⁷⁸ *Id.* § 19(d).

The Ziyang City Intermediate People's Court ruled that that it was not clear that domestic violence had taken place, convicting her of "intentional homicide" and to death; an appeals court upheld this decision in 2012. Li's case was then transferred to the Supreme People's Court. This led to a public outcry, and calls for a halt of the execution.

The new Guidelines deal with this type of situation. Article 19 states that:

"... actions taken to stop domestic violence that is being currently committed so as to avoid injury to the personal rights of oneself or another, shall be found to be justifiable defense and not bear criminal responsibility. Where defensive acts cause serious injury or death to the aggressor, and clearly go beyond the necessary degree, it is unjustified defense and criminal responsibility shall be borne, but punishment shall be reduced or excused."¹⁸⁰

It goes on to state that the:

"Determination of whether defensive acts 'clearly goes beyond the necessary degree' shall use a standard of what was necessary for the defender to avoid suffering unlawful harm from domestic violence, and be based on the actual severity of domestic violence the aggressor was then exhibiting, the cruelty of the methods, the environment and degree of danger that the defender faced, the means of stopping violence employed, the extent to which the aggressor was seriously injured, as well as severity of past domestic violence."¹⁸¹

The recognition of extenuating circumstances and redefining self-defense to cover situations where women act in self-defense in a context where law enforcement is negligent is an important step forward in China.

3.8 Access to Justice

Claiming and vindicating rights in court is one of the most important ways of enforcing human rights, including the right to live free of violence. However, very few victims and survivors seek help, let alone report the violence to the police and press charges. A recent survey by Partners for Prevention in China found that victims seldom sought support from formal services: only ten percent of women who had experienced partner violence reported to health workers and seven percent reported to the police. Among the women who told a family member, only twenty-five percent felt completely supported by their family, while forty-four percent experienced blame, indifference, or were told to keep quiet.¹⁸²

An important development relevant to legal reforms around domestic violence in China was the issuance of the above-discussed guidelines to judges and police in March 2015, which call for legal aid in Article Twenty-One. However, the language is declaratory rather than mandatory and states that: "Legal service establishments are encouraged and supported in reducing or waiving legal services fees for victims who truly have financial hardship but do not meet the level of eligibility for legal aid."¹⁸³

The March Guidelines also call for security organs and judicial-administrative organs to conduct consciousness raising and educational programs to prevent violence against women, hoping to "develop publicity and educational activities against domestic violence . . . using cases to explain law, community law discussion, and targeted legal education."¹⁸⁴ Recalling the aims of the Draft Law, these proposed efforts seek to "effectively prevent domestic violence, promote equality, tranquility and civility in family relations, and maintaining social harmony and stability."¹⁸⁵

¹⁸² Wang Xiangxian et al., *supra* note 91, at 35 (presenting the help-seeking behavior of victims of intimate partner violence and the responses they received from those to which they reported).

¹⁸³ The Supreme Court of the People's Republic of China, *Opinion on Handling Domestic Violence in Accordance With Law*, art. 21 (March 2, 2015).

¹⁸⁴ *Id.* art. 25.

¹⁸⁵ *Id.* art. 25.

Around the world, the vast majority of women who experience violence never seek help or report the violence to anyone. A recent analysis of survey data for thirty developing countries shows that on average, only four out of ten women sought any help, and only six percent sought help from authorities, such as police, lawyers, doctors, or religious authorities. And more specifically, only three percent sought help from the police—ranging from ten percent in Moldova and Ukraine to fewer than one percent in six countries: Bolivia, Burkina Faso, Haiti, Mozambique, Nigeria and Zimbabwe. The same study finds that many women do not seek help because they see violence as a way of life; but many did not know how and where to report violence. Even in Europe, a recent survey of twenty-eight countries found that, on average, only fourteen percent of women reported the most serious incident to the authorities.¹⁸⁶

The Draft Law does require police officers to look into reports of violence, but they may still merely issue a written warning if they do not consider the situation serious enough for criminal or administrative penalties.¹⁸⁷ Human Rights Watch, among others, have voiced concerns that this provision can allow “officers to shirk responsibilities from taking further actions.”¹⁸⁸ It is notable, for example, that the law neither requires the police to advise the women on their rights and options, nor to refer them to services and support organizations.

By way of contrast to the Chinese Draft Law, a number of countries have introduced provisions that seek to broaden access to justice through mechanisms to facilitate reporting, training of relevant officials, and measures to promote official responsiveness to complaints, as well as free legal assistance. We briefly review each in turn.

Examples of legislative provisions to facilitate reporting include Article Seven of Ghana's Domestic Violence Act (2007), which states that police officers must “respond to a request by a person for

¹⁸⁶ Klugman et al., *supra* note 7, at 71, 72.

¹⁸⁷ *Id.* art. 19.

¹⁸⁸ Didi Kirsten Tatlow, *China Drafts Its First Domestic Violence Law, but Rights Advocates Say it Falls Short*, N.Y. TIMES SINOSPHERE BLOG (Nov. 28, 2014, 4:16 AM), available at http://sinosphere.blogs.nytimes.com/2014/11/28/china-drafts-its-first-domestic-violence-law-but-rights-advocates-say-it-falls-short/?_r=0 (referring to a provision in the Draft Law that gives officers discretion to decide the seriousness of a complaint, and issue only “written warnings” for incidents they think are not deserving of administrative and criminal penalties).

assistance from domestic violence and shall offer the protection that the circumstances of the case or the person who made the report requires, even when the person reporting is not the victim of the domestic violence.”¹⁸⁹ Article Eight elaborates upon the duties of the officer.¹⁹⁰

Relevant experience in the region includes the Philippines Act, which imposes a fine against village officials or law enforcers who fail to report an incident of violence.¹⁹¹ In South Korea, the Special Act for the Prevention of Domestic Violence and Victim Protection Act (1997) includes mandatory investigation by police and medical facilities to provide treatment for physical and mental injuries.¹⁹² South Korean police are required to take emergency protection measures for victims by restraining a perpetrator from violent behavior or referring victims to domestic violence counseling centers, protective centers, or hospitals.¹⁹³ An important feature of the law is that anyone who becomes aware of domestic violence crimes—including teachers, doctors and social workers—may report to investigating agencies.¹⁹⁴

The Chinese Draft Law also does not provide for gender sensitive training of public officials and agencies responsible for addressing violence against women. Several laws from around the world have written this requirement into law, thus strengthening the rule of law for women and other survivors of domestic violence. For example, Article Forty-Seven of the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) calls upon the government and the judiciary to ensure that training courses are provided for all involved, including: judges, magistrates, prosecutors, court clerks, national law enforcement, and security agents.¹⁹⁵ Article Seven of the Albanian Law on Measures Against Violence in Family Relations (2006) charges the Ministry of Justice with responsibility for training medico legal experts on domestic violence.¹⁹⁶

¹⁸⁹ HANDBOOK, *supra* note 159, at 36.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 36.

¹⁹² *Domestic Violence Lawmaking in Asia*, *supra* note 81, at 218.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 18.

¹⁹⁶ *Id.* at 18.

Local authorities have a prominent role in countries other than the Philippines. A distinctive feature of the Taiwanese 1998 Act is the way in which all local governments are authorized to create a domestic violence prevention committee, to maintain a Domestic Violence Prevention Center, and to establish, among other things, a twenty-four hour hotline involving psychological support, housing, counseling. The engagement of local communities in combating domestic violence is a thread that runs through this law.¹⁹⁷

According to UN Women, laws on domestic violence in forty-five countries in 2012 included guarantees of free legal aid for women.¹⁹⁸ Legal aid is a critical element of access to justice for women in China and other jurisdictions. Article Twenty-One of the Guatemalan Law Against Femicide and Other Forms of Violence Against Women (2008) requires the government to provide legal aid for survivors.¹⁹⁹ In the absence of legal services for women, the letter of the law in China may remain a hollow promise.

In the event that a survivor is unable to go to court, some countries have provided for the possibility of representation of the survivor by a women's rights organization. The Kenyan Sexual Offense Act of 2006, for example, provides for a third party to bring a case if the survivor is unable to go to court by herself.²⁰⁰

In sum, the Chinese Draft Law does not appear to include many of the regional and global good practice elements that have been adopted elsewhere to facilitate reporting and enforcement.

4. BROADER HALLMARKS OF THE SECOND GENERATION OF DOMESTIC VIOLENCE LAWS

An important theme of this paper has been the ways in which national legislation against violence over the past two decades since

¹⁹⁷ Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reforms in China*, 5 E. ASIA L. REV. 197, 275 (2010).

¹⁹⁸ UN Women, *Progress of the World's Women: In Pursuit of Justice* 56 (2011-2012), <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf> (demonstrating that free legal aid provisions increase access women's access to justice system).

¹⁹⁹ HANDBOOK, *supra* note 159, at 40

²⁰⁰ *Id.*

the Beijing Platform has adopted more progressive and protective elements. We have reviewed these reforms with respect to the scope of violence and relationships covered as well as the types of protections provided for.

There are several other hallmarks of the second-generation lawmaking on domestic violence that are absent in China. China has adopted a primarily criminal justice based approach, whereas many other countries are shifting to a hybrid model that adopts from both the criminal and civil justice models. For example, laws and policies in Spain and several Latin American countries are utilizing educational policy as a way to combat violence against women, including the Guatemalan Law Against Femicide and Other Forms of Violence Against Women (2008) and the Mexican Law on Access of Women to a Life Free of Violence (2007). The latter requires the development of educational programs at all levels of schooling that promote gender equality and a life free of violence for women.²⁰¹ The Chilean Law on Intra-Family Violence, which dates back more than twenty years, states in article 3(a) that school curricula should include content about intra-family violence, including how to modify behaviors that enhance, encourage, or perpetuate such violence.²⁰² Finally, Brazil's Maria da Penha Law provides for awareness raising programs, for education on international conventions on the prevention of violence, and requires young men to become educated on issues of sexuality and violence.²⁰³

Important broader elements include the role of civil society, as well as engaging men and boys. All around the world, broad networks and alliances have been critical in building consensus and bringing disparate parties together to build common ground on laws and policies against gender-based violence.

In China, as noted at the outset, civil society has been on the frontlines working against gender-based violence. Elsewhere, government initiatives to reform legislation have often been a

²⁰¹ HANDBOOK, *supra* note 159, at 30.

²⁰² *Id.*

²⁰³ Lei No. 11.340, de 7 de Agosto de 2006 [Law 11,340 of August 7, 2006], DIÁRIO OFICIAL DA UNIÃO [OFFICIAL JOURNAL OF THE REPUBLIC OF BRAZIL] [D.O.U.] de 8.8.2006, art. 5, 8, 9, (Braz.), available at <http://www.compromissoeatitude.org.br/wp-content/uploads/2012/08/SPMLawmariapenha2006.pdf>.

response to pressures from social movements.²⁰⁴ Examples from Puerto Rico, Turkey, Kenya, Puerto Rico, Ghana, India, and Brazil are briefly recounted here to illustrate the types of sustained activism and efforts that have led to reform.

Puerto Rico's Domestic Violence Prevention and Intervention (1989) (also known as Law Fifty Four) was spurred by public outrage after a famous basketball player was merely subject to probation after bludgeoning his wife to death with a hammer.²⁰⁵ The above-mentioned revision of the penal code in Turkey in 2006, including criminalization of marital rape and sexual harassment in the workplace, came about after a bold campaign launched by the women's movement.²⁰⁶ Extensive media coverage, protests, and concerted lobbying by NGOs led to the Family Protection Act 2007 in Kenya. Public support stemmed from the 1998 death of a woman who was beaten by her policeman husband with a brick after telling him there was no meat for dinner.²⁰⁷ Several years of public outrage and demonstrations eventually led to the passage of legislation that criminalized domestic violence.²⁰⁸ Ghana's Domestic Violence Act

²⁰⁴ See generally, NATA DUVVURY ET AL., *Intimate Partner Violence: Economic Costs and Implications for Growth and Development*, in WOMEN'S VOICE, AGENCY, & PARTICIPATION RESEARCH SERIES 2013 NO. 3 (The World Bank, 2013), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/07/000456286_20131107124947/Rendered/PDF/825320WP0Intim00Box379862B00PUBLIC0.pdf (explaining the economic and social consequences stemming from domestic violence).

²⁰⁵ Jodie G. Roure, *Gender Justice in Puerto Rico: Domestic Violence, Legal Reform, and the Use of International Human Rights Principles*, 33 HUM. RTS. Q. 790, 808 (2011), http://johnjay.jjay.cuny.edu/files/departments/latin_american_studies/roure_final_pdf.pdf.

²⁰⁶ Indira Jaising, Member of the UN Comm. on the Elimination of Discrimination Against Women (India), Debate at the Regional Seminar for Asian Parliaments: Preventing and Responding to Violence Against Women and Girls: From Legislation to Effective Enforcement (Sept. 15-17, 2011).

²⁰⁷ David Gough, *Beaten Wives Challenge Custom*, THE GUARDIAN (Dec. 30, 1998), available at http://johnjay.jjay.cuny.edu/files/departments/latin_american_studies/roure_final_pdf.pdf.

²⁰⁸ See Mary Kimani, *Taking on Violence Against Women in Africa*, AFRICA RENEWAL ONLINE (2012), <http://www.un.org/africarenewal/magazine/special-edition-women-2012/taking-violence-against-women-africa> (detailing the years of protests and advocacy that ultimately led to the passage of legislation); see also Mandyen Brenda Anzaki, *Violence Against Women in Africa: Attitudes and Laws*, THE LAWYERS CHRONICLE, <http://thelawyerschronicle.com/violence-against-women-in-africa-attitudes-and-laws/> (explaining how advocacy for domestic violence legislation in Kenya fits into a regional struggle for violence against women enforcement).

was passed in 2007 following concerted efforts of the women's movement and women's rights advocates, including the "Sixteen Days of Activism" and media campaigns, which brought the issue to the national agenda.²⁰⁹ Amendments to the Indian Penal Code following the Verma Committee in 2013 increased the scope of the law to include all types of sexual assault against women and provided for capital punishment in cases where rape leads to death of the victim or leaves her in a persistent vegetative state.²¹⁰ These changes were prompted by mass protests and demonstrations after the tragic gang rape of "Nirbhaya" on a Delhi bus in 2012.²¹¹

Of special note is the first Brazilian federal law to combat domestic violence against women, the Maria da Penha Law, which grew out of several decades of struggle led by local women's groups. The law—passed in 2006 in response to a particularly horrific case—is a comprehensive framework relating to preventing and combating domestic and familial violence against women in compliance with CEDAW principles.²¹² It provides that local, state and federal governments, and the justice sector, are responsible for the creation and implementation of mechanisms to combat and prevent domestic and family violence against women.²¹³ Integrated measures and mechanisms to prevent violence, such as awareness

²⁰⁹ Takyiwaa Manuh, *African Women and Domestic Violence*, OPEN DEMOCRACY (Nov. 26, 2007) https://www.opendemocracy.net/article/5050/ghana_domestic_violence (describing the origins of domestic violence legislation in four African Countries).

²¹⁰ Rangita de Silva de Alwis, *Women's Voice and Agency: The Role of Legal Institutions and Women's Movements*, in *Women's Voice and Agency Research Series* 2014 No. 7, 4, available at <http://www.worldbank.org/content/dam/Worldbank/document/Gender/de%20Silva%20de%20Alwis%202014.%20voice%20agency.%20The%20role%20of%20legal%20institutions%20and%20women's%20movements.pdf> (explaining the events leading up to amendments to the Indian Penal Code regarding the criminalization of all types of sexual assaults) [hereinafter *Women's Voice and Agency*].

²¹¹ Niharika Mandhana and Anjani Trivedi, *Indians Outraged Over Rape on Moving Bus in New Delhi*, N.Y. TIMES (Dec. 18, 2012, 7:01 AM), <http://india.blogs.nytimes.com/2012/12/18/outrage-in-delhi-after-latest-gang-rape-case/>.

²¹² *Women's Voice and Agency*, *supra* note 210, at 8 (discussing the horrific case that instigated the law as well as the contours of the law itself).

²¹³ Lei No. 11.340, de 7 de Agosto de 2006, DIÁRIO OFICIAL DO RIO DE JANEIRO [D.O.E.R.J.] de 8.8.2006 art. 8, (Braz.) available at <http://www.compromissoeatitude.org.br/wp-content/uploads/2012/08/SPMLawmariapenha2006.pdf>.

raising programs and educational programs on international conventions on the prevention of violence, are included.²¹⁴

Several national laws on violence against women mandate monitoring by various mechanisms, including implementing agencies, agencies already set up to monitor implementation of the law, and civil society. The Philippine Anti-Violence Against Women and their Children Act (2004) has set up the 'Inter-Agency Council on Violence Against Women' that includes representatives from different government departments.²¹⁵ The Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) mandates a 'Special Government Delegation on VAW' and a 'State Observatory on VAW' to, inter alia, supervise the implementation of laws and prepare annual reports.²¹⁶ Brazil's Maria da Penha law provides for monitoring by civil society.²¹⁷ A consortium of women's NGOs, women's research centers, and feminist networks—named the Observatório Lei Maria da Penha—monitor the implementation of the law in the country's twenty-seven states.²¹⁸

Finally, but not least, we review the potential role of constitutional guarantees against violence. Assuring individual justice is critically important. At the same time, framing a case as a constitutional and human rights claim can help to create jurisprudence that impacts more than the individual claimant.

Constitutions not only provide the foundation and legal basis for lawmaking in a country, they can also help address the culture of impunity around gender-based violence and build support for women's rights as human rights. Several constitutions have included explicit provisions related to violence. Nearly twenty years ago, South Africa provided in Article Twelve of its 1996 constitution that "Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources."²¹⁹ In Malawi, a

²¹⁴ *Id.*

²¹⁵ *Domestic Violence Lawmaking in Asia*, *supra* note 81, at 217.

²¹⁶ *HANDBOOK*, *supra* note 159 at 22.

²¹⁷ Law 11,340 of August 7, 2006, art. 8, (Braz.).

²¹⁸ *O que é o Observatório [What the Observatory is]*, OBSERVATÓRIO LEI MARIA DA PENHA [THE OBSERVATORY OF THE MARIA DA PENHA LAW] (Nov. 13, 2015) <http://www.observe.ufba.br/observatorio>. (defining the Observatory's goals as implementing and applying the Maria da Penha Law).

²¹⁹ S. AFR. CONST., 1996.

constitutional amendment in 2010 commits to implementing policy on domestic violence.²²⁰ Recently drafted constitutions in Tunisia and Egypt have enshrined anti-violence against women as rights guarantees.²²¹

A number of constitutional cases have ruled on the duties imposed upon the police. Countries such as India and South Africa, with vibrant constitutional litigation traditions, have affirmed domestic violence as a constitutional right. In *S. v. Baloyi* (1999), the Constitutional Court in South Africa held that the Constitution holds the state accountable to protecting the rights of all persons to be free from domestic violence.²²² In *Carmichele v. Minister of Safety and Security* (2001), the South African High Court held that there was a constitutional duty on the state to protect “the public in general and women and children in particular against the invasion of their fundamental rights by the perpetrators of violent crime.”²²³ In *Visakha v. State of Rajasthan* (1997), and *Apparel Export Promotion Council v. A.K. Chopra* (1999), the Indian Supreme Court held that the national constitution guaranteed the rights of women to a safe working environment free from sexual abuse.²²⁴ It was held in these cases that the Constitution and international conventions provided authority for the courts to develop legal principles for employers to protect women against violence, even in the absence of legislation.

²²⁰ CONST. OF THE REPUBLIC OF MALAWI 1994, art. 13 (amended 2010) (mandating the state to work towards gender equality through the “implementation of policies to address social issues such as domestic violence”).

²²¹ CONST. OF TUNIS., 2014, art. 46; CONST. OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 11.

²²² *State v. Baloyi et al.*, 1999 (CC 29/99) at 11 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1999/19.pdf>.

²²³ *Carmichele v. Minister of Safety and Security*, 2001 (CC 48/00) at 40 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2001/22.pdf>.

²²⁴ *Vishaka et al. v. State of Rajasthan et al.*, A.I.R. 1997 S.C. 3011 (India); *Apparel Exp. Promotion Council v. A.K. Chopra*, A.I.R. 1999 S.C. 625 (India).

4.1. *The Impact of International Human Rights on National Lawmaking*

Does being party to an international human rights instrument have an impact on state practice?

Recent analysis by David L. Richards and Jillienne Haglund found that international law can make a difference in the strength of domestic violence legal protections. What their data shows is that eight years after a country ratifies the CEDAW, that country is twenty-three percent more likely to adopt full legal protections against domestic violence.²²⁵ At the same time, countries that placed a full reservation on Article Two “embody[ing] the principle of the equality of men and women in their national constitutions or other appropriate legislation,” had weaker domestic violence and marital rape laws.²²⁶ The authors also argue that strong laws on domestic violence have broader ripple effects beyond violence: “Countries with greater domestic legal protections against gender violence have less gender-based inequality, greater levels of human development . . .”²²⁷ — although of course the causality can work in multiple ways.

There has been much debate by Eric Posner and others about the value of international human rights law beyond its normative force.²²⁸ One point that emerges clearly from the experience of China is that international conventions can help women’s groups mobilize in powerful ways and provide a standard setting framework to bolster their claims. International human rights law can have indirect and direct impacts on strengthening domestic violence law.

²²⁵ David L. Richards and Jillienne Haglund, *How Laws Around the World Do and Do Not Protect Women From Violence*, THE HUFFINGTON POST (Feb. 11, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/11/how-laws-around-the-world-do-and-do-not-protect-women-from-violence/>.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See, e.g., Eric Posner, *What’s the Best Use for Human Rights Watch’s Budget?* (Oct. 1, 2015), <http://ericposner.com/category/human-rights/>.

5. CONCLUSIONS AND THE WAY AHEAD

There is a new global consensus about the unacceptability of violence against women, as reflected in the 2015 Sustainable Development Goals. Our review showed that new and emerging international legal norms and national state laws—including the Draft Law in China—are recognizing women's right to live a life free of violence. National legislation in much of the world is consistent in not only prohibiting and criminalizing violence, but also in providing mechanisms to support victims and their families in a range of ways.

China's ratification of CEDAW involves important international legal commitments with respect to violence against women, among other things. It is therefore appropriate to assess the extent to which these international standards are being met. Other States have explicitly referenced key benchmarks in international law in their domestic violence laws, including Turkey's 2004 Penal Code, and South Africa and Guatemala's 2008 legislation. Although Chinese laws do not explicitly reference international laws, the invocation of the CEDAW and associated international law would help as an interpretive tool.

It appears that CEDAW and DEVAW have informed China's Draft Law. However, we find that, in several basic respects, the Draft Law falls substantially short of international standards, as well as behind the standards set by countries in the Asia region and around the world. This includes the definition of violence and the scope of relationships covered, which are both too narrow. Moreover, the possibilities for protection and support are weak. These are all elements that could be addressed in the finalization of the law, as well as in later revisions.

Due diligence is an important principle of international law that is missing from the Draft Law. Women's rights advocates in China have argued that inaction on the part of the authorities should be addressed in the Draft Law to help overcome the culture of impunity. However, the due diligence norm is not included in the Draft Law. A good practice example of a *de jure* translation of the due diligence norms can be found in Article Five of the Costa Rican Criminalization of Violence against Women Law (2007), which

recommends that public officials act swiftly and effectively while respecting procedure and the human rights of women affected.²²⁹

Data is critical to monitoring performance in the implementation of laws. Several countries have legislatively mandated data collection including Albania's Law on Measures Against Violence in Family Relations, which calls upon government agencies to maintain statistical data on domestic violence; Guatemala's Law against Femicide and other Forms of Violence against Women (2008); and Mexico's Law on Access of Women to a Life Free of Violence (2007), which provides for a creation of a databank on gender based violence.²³⁰

In sum, much progress has been made on paper in China and elsewhere, but there is still far to go. The commitments against violence made under international law need to be given life and force on the ground through appropriate legislative frameworks alongside policies and programs working to bring about changes in norms about violence.

²²⁹ HANDBOOK, *supra* note 159, at 21.

²³⁰ *Id.* at 23.